MP NATHAN

v.

VALAITHAN RAMAN

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CIVIL APPEAL NO: 11-8-2001]
11 APRIL 2003

TORT: *Defamation - Libel - Libellous letter written in writer's course of employment - Whether writer of letter proper party to be sued*

CIVIL PROCEDURE: *Parties - Doubt as to person to sue - Libellous letter written in writer's course of employment - Whether writer of letter proper party to be sued*

TORT: *Defamation - Publication of libellous material - Letter containing alleged defamatory material carbon-copied and distributed - Whether carbon-copies constituted publication - Whether such publication protected by qualified privilege*

This was an appeal by the appellant/defendant against the judgment of the magistrate's court ordering the defendant to pay some monies as general damages to the respondent/plaintiff in an action brought by the respondent/plaintiff against the defendant. The action concerned the defendant's alleged 'publication' of a letter that the respondent submitted, contained defamatory statements of the respondent. Both parties agreed that the principal issue to be determined before the court was whether the wrong party was sued in this instance.

Held:

[1] The appellant testified that he wrote the letter complained of in his capacity as manager of the estate and that he had no malice against the respondent. The effect of this evidence was that he issued the letter in the course of employment. The said letter was so intimately representative of the estate that the estate could not be divorced from it. Any redress for that act if tortiously carried out, could not be asked for from the appellant. (pp 454 e-h & 455 c-e)

[2] On a question of publication of the alleged defamatory matter, the letter complained of was carbon-copied to the human resources division and to the senior assistant of the estate. Although these carbon copies were publications, yet those publications were protected by qualified privilege, as the communication was made by someone (manager) with interest in the subject matter to somebody else (human resources division and assistant manager) who had a corresponding undeniable interest in receiving the communication. Thus, there was no external publication. There was internal publication that was protected by qualified privilege. (pp 457 b & 458 c-e)

[Appeal allowed.]

Case(s) referred to:

Baharuddin Ali & Co v. BPMB Urus Harta Sdn Bhd & Anor [2000] 4 CLJ 693 HC ***(refd)***
Boxsius v. Goblet Freres [1894] 1 QB 842 ***(refd)***
Bryanston Finance Ltd v. de Vries [1975] QB 703 ***(refd)***
Byrne v. Deane [1937] 2 All ER 204 ***(refd)***
Commercial Union Assurance Co of NZ Ltd v. Lamont [1989] 3 NZLR 187 ***(refd)***
Edmondson v. Birch & Co Ltd [1907] 1 KB 37 ***(refd)***
Jenner v. Sun Oil Co Ltd [1952] Ontario Reports 240
Jones v. Amalgamated Television Services [1991] 23 NSWLR 364 ***(refd)***
Keppel Bus Co Ltd v. Sa'ad Ahmad [1974] 2 All ER 700 ***(refd)***
Lau Choon Liong v. Paul Ling Teck Yiu [1995] 1 CLJ 364 HC ***(refd)***
Osborn v. Thomas Boulter & Son [1930] 2 KB 226 ***(refd)***
Pullman v. Hill & Co [1891] 1 QB 525 ***(refd)***
Riddel v. Glasgow Corporation [1911] HL 35 ***(refd)***
Riddick v. Thames Board Mills Ltd [1977] QB 881 ***(refd)***
S Pakianathan v. Jenni Ibrahim [1988] 1 CLJ 771 SC ***(refd)***
Spencer v. Silitoe & Anor [2002] EWCA Civ 1579 ***(refd)***
Webb v. Bloch [1928] 41 CLR 331 ***(refd)***
Wennhak v. Morgan [1888] 20 QBD 635 ***(refd)***
Wong Wai Hing & Anor v. Hui Wei Lee [2001] 2 HKC 19 ***(refd)***

Other source(s) referred to:

Gatley on Libel and Slander, 8th edn, pp 406-407
Gatley on Libel and Slander, 9th edn, para 6.7
Halsbury's Laws of England, 4th edn, vol 28, paras 32, 38
Halsbury's Laws of Malaysia, vol 2, para 30.068

For the appellant - A Ramadas; M/s Ramadas & Assoc
For the respondent - Manian K Marappan (R Krishnan Kutty); M/s R Krishnan Kutty & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Jeffrey Tan J:

This is an appeal by the defendant in the court below against the judgment of the Kluang Magistrate's Court ordering the defendant, *inter alia*, to pay RM10,000 as general damages to the respondent/plaintiff, in the action brought by the respondent/plaintiff against the defendant for the defendant's alleged 'publication' of the following letter that the respondent asserted contained defamatory statements of him.

Golden Hope Plantations Berhad

Ladang Tambuku
6 December 1996

Mr. Velaithan s/o Raman,
Conductor,
Tambuku Estate,
Present.

Dear Sir,

WILFUL DAMAGE TO AND UNLAWFUL REMOVAL OF ESTATE PROPERTY

We refer to your letter dated 30 November 1996 and our's dated 22 November and 29 November 1996.

After 13 years service with the Company, you are aware that the owner of the property and the building within it, is the Company. We do not have any record of you requesting for permission from the Management for digging up the grass turf in the vacant staff bungalow compound on 22 November 1996. This has caused substantial damage to the bungalow compound and is an act of willful damage.

Further, despite strict instruction to you on 22 November 1996 from the Senior Assistant directly and that of the Manager through Sgt. Rahmat, not to remove the dug up grass turf from the vacant staff bungalow compound, you defied lawful instructions and unlawfully removed the grass turf to Tambuku Estate. This is an act of gross insubordination and theft.

Please clarify you explanation by 12 December 1996, failing which we will have to take appropriate disciplinary action.

Please sign and return duplicate copy of this letter in acknowledgement.

Yours faithfully

...
Manager
M.P. Nathan

c.c Human Resources, Plantation Division,
c.c Senior Assistant Present

But for the time being, it is not necessary to deal with the alleged defamatory matter in the aforesaid letter, as both learned counsel, Mr. A. Ramadass for the appellant and Mr. A Maniam for the respondent, agreed that the issue whether the wrong party was sued could see off this appeal.

With regard to the salient facts, it is not in dispute that the respondent was a field conductor of the Tambuku Estate and that the respondent was the manager of the same said estate at the material time. It is also not in dispute that one Golden Hope Plantation Berhad (GH) was the owner of Tambuku Estate. The Appeal Record reveals that the spat between the parties arose in the circumstances as follows. On 22 November 1996 (see p. 101 of the Appeal Record), GH wrote to and informed the respondent that he (respondent) "had caused the grass turf in the compound of the staff bungalow ... to be dug up .... (and that was) tantamount to willful damage to estate property". GH also asked, in their letter signed by the appellant as manager, the respondent to give his "explanation in writing by 27 November 1996". There is nothing in the Appeal Record to suggest that the respondent gave his explanation by 27 November 1996. Anyway, on 29 November 1996, GH again wrote to the respondent (see p. 92 of the AR), and in that letter dated 29 November 1996 and signed again by the appellant as manager, GH notified the respondent that his act in digging up of the grass turf was "tantamount to insubordination and also theft of estate property". That was followed by the letter dated 30 November 1996 (see p. 93 of the AR) of the respondent who explained that he had dug the grass turf "with the permission of the owner who planted it", and the aforesaid letter of the appellant dated 6 December 1996.

Mr. Ramadass began his submission by saying that the defendant should have been GH. The letter dated 6 December 1996 was written on the letterhead of GH, and issued by GH. He said, that the letter was signed by the appellant as "Manager of Tambuku Estate". The act was that of GH. In *Baharuddin Ali & Co v. BPMB Urus Harta Sdn Bhd & Anor* [2000] 4 CLJ 693, it was held that there could be no redress against the 2nd defendant who had merely performed his duties and obligations as employee of the 1st defendant. That

letter dated 6 December 1996 was clearly that of GH and not that of the appellant in his personal capacity. Then moving to a different issue altogether, Mr. Ramadass argued that that letter dated 6 December 1996 was written only to the respondent, and that there was no external publication. Then referring to *Lau Choon Lionel v. Paul Ling Teck Yiu* [1995] 1 CLJ 364, 367, learned counsel contended that the letter was carbon-copied only to the organs of GH who had an interest in the matter. There was no evidence that the letter was ever published, and if third parties came to know of the contents, it was not because of the act of the appellant.

Mr. Maniam replied by first citing from *Halsbury's Laws of England,* 4th edn vol 28 paras 32 and 38, and then from *Halsbury's Laws of Malaysia,* vol 2 para 30.068, which, the latter, reads as follows.

> An employer or principal is civilly liable for the act of publication by his employee if done in the course of his employment and within the scope of his authority or employment, even where he has had no actual authority to write or publish a libel. If the employee or agent writes and publishes statements defamatory of the plaintiff which he knows to be untrue he will be held to be malicious and the employer or principal will be vicariously liable for that malice. This doctrine is as applicable to incorporated companies as to individuals.

Mr. Maniam submitted that no evidence was adduced by the defence that the appellant was acting on the instructions of his principal, and that the appellant had acted on his own. Mr. Maniam also divulged that there was also no evidence from the plaintiff that the appellant was acting against the instructions of his principal. But learned counsel submitted that in the absence of any evidence that the appellant had acted within the scope of his authority the appellant must be held personally liable. Cited as authority for that latter submission was the following passage from *Gatley on Libel and Slander* 8th edn pp. 406-407:

> A principal or master is civilly liable for defamatory words published by his agent or servant with his authority or consent. He is also liable where his agent or servant, in publishing the words, was acting within the scope of his employment, even though he was expressly forbidden to publish any defamatory matter, or he published it solely for his own benefit and not for the benefit of his principal or master. The agent or servant will be deemed to have acted within the scope of his employment when the publication, although itself unauthorised, is so directly incidental to some act which he was authorised to do that it may be said to be a mode, though no doubt an improper mode, of performing such authorised act. "Although the particular act which gives the cause of action may not be authorised, still if the act is

> done in the course of employment which is authorised, then he master is liable for the act of his servant." On the other hand, if the publication was wholly unconnected with the act which the agent or servant was authorised to do, the principal or master will not be liable.

While "a principal is civilly liable for defamatory words published by his agent or servant with his authority or consent ... or where his agent or servant in publishing the words was acting within the scope of his authority of his employment" (*Gatley ibid* p. 407), it must also be noted that "it is a question of fact and degree whether a tortious act is so much within the scope of employment as to allow a court to determine that the act was the performance of a duty generally authorised but tortiously carried out" (see *Commercial Union Assurance Co. of NZ Ltd v. Lamont* [1989] 3 NZLR 187, where it was held by the Court of Appeal of New Zealand that the liability of employers in action for malicious prosecution by its employees is no different than for other torts). "... the question whether the act done, *albeit* unauthorised and unlawful, had been done in the course of the employment (is) a question of fact, (but) a jury would only be entitled to find that an act had been done in the course of employment if facts had been proved which established the extent of the master's delegated authority, express or implied, and that the servants' act was done under that authority, as part of his duty to his master" (*Keppel Bus Co Ltd v. Sa'ad bin Ahmad* [1974] 2 All ER 700 per Lord Kilbrandon). In *Keppel*, the conductor of a bus belonging to the appellant grievously assaulted the plaintiff who was a passenger. On the issue whether the conductor did what he did 'in the course of his employment', Lord Kilbrandon had this to say.

> "The course of employment is not limited to the obligations which lie on an employee in virtue of his contract of service. It extends to acts done on the implied authority of the master". In *Poland v. John Parr & Sons* [1927] 1 KB 236, a carter, who had handed over his wagon and was going home to his dinner, struck a boy whom he suspected, wrongly but on reasonable grounds, of stealing his master's property. The master was held liable for the consequences, since a servant has implied authority, at least, in any emergency, to protect his master's property. 'Maybe his action was mistaken and maybe the force he used was excessive; he might have pushed the boy instead of striking him. But that was merely acting in excess of what was necessary in doing an act which he was authorised to do. The excess was not sufficient to take the act out of the class of authorized acts ... (per Scrutton LJ, at 244) ... In *Bank of New South Wales v. Owston* [1879] 4 App Cas 270 at 290, where the question was whether a bank manager was within his authority in bringing a criminal charge, Sir Montague Smith observed in relation to evidence that such an action might be taken in an emergency: 'An authority

to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shews that such exigency is present, or from which it might reasonably be supposed to be present.'

A pursuer who intends to successfully pursue a claim against the principal must plead that the employee was clothed with authority (see *Riddel v. Glasgow Corporation* [1911] HL 35, 36). Except that the instant action was not against the employer of the appellant. In the event, it was the appellant as defendant who pleaded that the letter dated 6 December 1996 was issued with respect to an act that was not sanctioned by the management of the estate (see 1st limb of para. 4c of the defence), that he was justified to write that letter (see 2nd limb of para. 4c of the defence), that that letter was written pursuant to his duty and moral obligation as manager of the said estate to put things right (see para. 4c of the defence), that that letter was written to obtain an explanation from the respondent (see para. 5c of the defence), that as manager of the estate he had asked for the respondent's explanation (see para. 5d of the defence), that he was an agent of the estate, and that the respondent could not pursue any action against him (see para. 6 of the defence). Now, those pleadings of the appellant were not put into issue by the respondent. Indeed, in his testimony in the court below, the respondent agreed that "Tuan punya ladang adalah GH ... Yang diberi kuasa untuk mentakbir adalah pengurus ... Pengurus (meaning the appellant) perlu penjelasan saya ... saya adalah orang bawah dan perlu jawab surat itu (meaning the letter dated 22 November 1996) ... Dia buat dalam tugas sebagai Pengurus ... Defendan adalah pengurus pada masa itu (see pp. 11-13 of the AR). "As for the testimony of the appellant in the court below, the appellant testified that he was the manager of the Tambuku and Bukit Benut Estates, that it was his duty to manage the financial, operational and employee affairs of both estates, that on 22 November 1996 he was informed that the carpet grass from one of the bungalows of the estate had been dug up, that he was informed that it was the respondent who had done so, that as manager of the estate he then wrote the letter dated 22 November 1996 to the respondent for an explanation, that he wrote the letters dated 29 November 1996 and 6 December 1996 in his capacity as manager of the estate, that he "tekankan displin kerana ladang adalah luas dan tanpa displin sukar untuk kawal ladang untuk efektif, that his acts "selama ini adalah diatas nama pengurus ladang Tambuku", and that he had no malice against the respondent (see pp. 21-25 of the AR).

The effect of the evidence of the appellant was that he issued that letter dated 6 December 1996 in the course of employment. On the same score, the testimony of the assistant manager of the estate (DW1) was that the purpose of the letter dated 6 December 1996 was to put on record the removal of the

carpet grass from the staff bungalow and to obtain an explanation from the respondent for the said removal (see p. 20 of the AR). Even the respondent admitted that "Dia buat dalam tugas sebagai Pengurus". Of course it could be argued that to save his own skin the appellant would surely say that the letter was issued in the course of employment. But then again, was not the removal of the carpet grass of the bungalow of the estate, which turf was the property of the estate, a matter that concerned the appellant who was after all the manager of the estate? And since the matter of the removal of the carpet grass was surely a matter that concerned the appellant, then it must be held that the letter dated 6 December 1996 which only addressed the matter of the removal of the carpet grass, was an act within the scope of the employment of the appellant and within the duty of the appellant to the estate. At any rate, that letter must be an act that was so directly incidental to some act that the appellant as manager of the estate was surely authorised to do, to protect the property of his employer. It is so clear that the letter complained of was one that was surely done in the course of employment and one that at the very least was generally authorised. The letter was not wholly unconnected with the act that the appellant was authorised to do, and could not be viewed as independent of the estate. Rather, the letter was so intimately representative of the estate that the estate could not be divorced from it (see *Wong Wai Hing & Anor v. Hui Wei Lee* [2001] 2 HKC 19). And any redress for that act if tortiously carried out, could not be asked for from the appellant.

With regard to the submission that there was no external publication, a submission now is only of academic interest in view of the latter finding which effectively disposes off this appeal, but which submission could be addressed for completeness, it is pertinent to examine the meaning of 'publication'.

In *Webb v. Bloch* [1928] 41 CLR 331, 363-364, Issacs J said this:

> The meaning of 'publication' is well described in *Folkard on Slander and Libel* 5th edn (1891) at 439, in these words: 'The term published is the proper and technical term to be used in the case of libel, without reference to the precise degree in which the defendant has been instrumental to such publication; since, if he has intentionally lent his assistance to its existence for the purpose of being published, his instrumentality is evidence to show a publication by him.' In *Starkie on the Law of Slander and Libel* (1830) vol 2 at 29, it is said: 'The declaration generally avers, that the defendant published and caused to be published; but the latter words seem to be perfectly unnecessary either in a civil or criminal proceeding; in civil proceedings, the principal is to all purposes identified with the agent employed by him to do any specific act' ... In *Parkes v. Prescott* [1869] LR 4 Ex 169 at 173, Giffard QC quotes from the second edition of Starkie: 'All who are in any degree accessory to the publication of a libel, and by any means whatever conduce

> to the publication, are to be considered as principals in the act of publication: thus if one suggests an illegal matter in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication when it has been so effected.' In *R v. Paine* [1696] 5 Mod 163 at 167 (87 ER 584 at 587) it is held: 'If one repeats and another writes a libel, and a third approves what is wrote, they are all makers of it; for all persons who concur, and show their assent or approbation to do an unlawful act, are guilty: so that murdering a man's reputation by a scandalous libel may be compared to murdering his person; for if several are assisting and encouraging a man in the act, though the stroke was given by one, yet all are guilty of homicide.

Issacs J was more effective in the following enunciation:

> To publish a libel is to convey by some means to the mind of another the defamatory sense embodied in the vehicle.

In *Pullman v. Hill & Co.* [1891] 1 QB 525, 527, Lord Esher MR made the following statements:

> The first question is, whether, assuming the letter to contain defamatory matter, there has been publication of it. What is the meaning of 'publication'? The making known of the defamatory matter after it has been written to some person other than the person to whom it is written. If the statement is sent straight to the person to whom it is written then there is no publication of it; one cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. If a letter was not communicated to anyone but the person to whom it is written, then there is no publication of it.

In the same case, Lopes LJ stated, "What is meant by publication? Communication of the defamatory matter to a third party". That there must be communication to a third person was also clearly specified in *Wennhak v. Morgan* [1888] 20 QBD 635, 637, where it was stated "The uttering of a libel to the party libelled is clearly no publication for the purposes of a civil action", in *Jenner v. Sun Oil Co Ltd* [1952] Ontario Reports 240 where it was stated "... the tort consists in making a third person understand actionable defamatory matter", in *S Pakianathan v. Jenni Ibrahim* [1988] 1 CLJ 771, where it was stated "In order to constitute publication, the defamatory matter must be published to a third party and not simply to the plaintiff." By publication is meant the making known of the defamatory matter, after it has been written, to some person other than the person of whom it is written, and in *Jones v. Amalgamated Television Services* [1991] 23 NSWLR 364 where it was stated that "Publication takes place where an imputation defamatory of the plaintiff has been communicated to some person other than the plaintiff himself". Suffice

to say that publication is a question of fact and whether or not publication has taken place must depend on the circumstances in each case (see *Byrne v. Deane* [1937] 2 All ER 204, 212).

The instant letter was addressed to the respondent, and there was no evidence of any publication to a third person. None of the witnesses summoned by the plaintiff testified in the court below that that letter was ever published to them. The evidence was that the letter was carbon-copied to the Human Resources Division and to the senior assistant of the estate, a fact admitted by Mr. Ramadass. But were those carbon-copies publications?

Gatley on Libel and Slander 9th edn para. 6.7 states that "it is clearly established in England that there is publication when A, an employee of a company, communicates defamatory material to a fellow employee, even if there is no further publication outside the company and even if the matter relates only to the company affairs". The following cases, *viz*., *Pullman v. Hill & Co* [1891] 1 QB 524 where it was held that there was publication of a defamatory letter to the typewriter and to the office boy of the defendant, *Boxsius v. Goblet Freres* [1894] 1 QB 842 where it was held that the dictation of the letter to the clerk of the defendant was publication, *Edmondson v. Birch & Co Ltd* [1907] 1 KB 37 where it was again held that there was publication to the defendant company's clerks, *Osborn v. Thomas Boulter & Son* [1930] 2 KB 226 where the defendant admitted publication to its servants, *Bryanston Finance Ltd v. de Vries* [1975] QB 703 where nobody questioned the fact of publication to the secretary by an individual or suggested that the individual was, by dictating the letter to his secretary or agent, merely communicating the letter to himself, certainly support *Gatley*. But the position is not as clear-cut as that, for it has been argued, a fact acknowledged by *Gatley ibid*, "that in such cases there is no publication where the servant of a company produces a report which is not read by anyone outside the company for the acts of the servant making the report and the servant reading it are acts of the company and there is no liability for publication to oneself". And that argument was advanced by Lord Denning, in *Riddick v. Thames Board Mills Ltd* [1977] QB 881, who, on the underlying rationale that a company can only operate through its employees, held that the act of X in making the internal memorandum of the defendant that allegedly contained material defamatory of the plaintiff and the acts of X's secretary and R in receiving it were authorised acts and were therefore the acts of the defendants and accordingly that there had been no publication of the libel by the defendants to anyone other than themselves and a person could not be sued for publishing a libel to himself. Waller LJ and Stephenson LJ held however that the court was bound by authority that there was an actionable publication of the libel by X when he dictated the memorandum to

his secretary and when he caused it to be transmitted to R. But their Lordships, Waller LJ and Stephenson LJ, held that the defendants were protected by qualified privilege because there was no evidence on which it could be found that the memorandum published by X to his secretary and R was infected by the malice of F and S. A similar approach could be seen in *Spencer v. Sillitoe and Anor* (Court of Appeal (Civil Division) [2002] EWCA Civ 1579, 22 October 2002), where the secondary defence was that the publication within the company had been on an occasion of qualified privilege and without malice, and where it was held there is no doubt that the occasion of publication was in law qualifiedly privileged.

Then it must appear that even if the carbon copies to the Human Resources Division and to the assistant manager were publications, that yet those publications were protected by qualified privilege, as the communication was made by someone (manager) with an interest in the subject matter to someone (Human Resources Division and assistant manager) who obviously had a corresponding undeniable interest in receiving the communication. There was no external publication. The internal publication, if at all any publication, was protected by qualified privilege. But as said, the issue of publication has been addressed only for completeness. The finding that redress could not be asked from the appellant already settles the outcome of this appeal. Accordingly and in allowing this appeal on the grounds herein, it is ordered that the judgment obtained by the respondent in the court below be set aside, and that the respondent do pay to the appellant his costs here and below.